ORIGINAL

IN THE SUPREME COURT OF OHIO

LISA G. HUFF, et. al.	)	Supreme Court of Ohio Case No. 2010-0857
	)	
Plaintiffs-Appellees	)	
	)	Appeal from the Trumbull County
vs.	)	Court of Appeals, Eleventh Judicial
	)	District
	)	
	)	Court of Appeals Case No. 2009 T 00080
	)	
FIRST ENERGY CORP., et. al.	)	
	)	
Defendants-Appellants	)	

RESPONSE TO MOTIONS FOR RECONSIDERATION

David Betras (30575)
Susan Gaetano Maruca (0065169)
Betras, Maruca, Kopp & Harshman, LLC
6630 Seville Drive
PO Box 125
Canfield, OH 44406
Phone: (330) 330-746-8484
FAX: (330) 702-8280
COUNSEL FOR APPELLEES, LISA G. HUFF, ET. AL.

John T. Dellick (0016271)
Harrington, Hoppe & Mitchell, LTD.
26 Market Street, Suite 1200
PO Box 6077
Youngstown, OH 44501
Phone: (330) 330-744-1111
Fax: 744-2029
COUNSEL FOR APPELLANT
OHIO EDISON COMPANY

Clifford Masch (0015737)
Brian D. Sullivan (0063536)
Reminger & Reminger
Suite 1400
101 Prospect Avenue, W.
Cleveland, Ohio 44115-1093
COUNSEL FOR APPELLANT
ASPLUNDH TREE EXPERT CO.

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Now comes the Plaintiffs-Appellees by and through the undersigned counsel, and respectfully requests this Court to deny Appellants' Motions for Reconsideration. The arguments raised by the Appellants in their Motions for Reconsideration have already been considered by this Court and this Court has declined to accept jurisdiction in this case. Therefore, Appellants' Motions for Reconsideration should be denied.

On May 8, 2001, a contract was executed between Appellants, whereby Asplundh would provide utility vegetation management services for Ohio Edison effective January 1, 2001 through December 31, 2004. The contract entered into between the Appellants provided that Asplundh:

> Should do all work specified in such orders according to the terms and conditions thereof and of this Contract, according to the First Energy Vegetation Management Specifications set forth in Attachment A and made a part hereof as may be applicable, according to the National Electric Safety Code and accepted forestry practice, in a good and workmanlike manner, in compliance with applicable laws, codes, all regulatory requirements of governmental authorities as otherwise set out in this Contract or required, and in general of the entire satisfaction of First Energy." (See Affidavit of Michael Carrier, Carrier Deposition, Exhibit C).

In addition to the aforementioned provisions, Appellants were subject to a protocol whereby the decision to remove a tree that's greater than 30 inches in diameter, that has been identified by Asplundh's crew foreman as a tree that should be removed (i.e. a "priority tree"), must first have the approval of the forestry technician. The forestry technician is not an employee of Asplundh; but rather is an employee of Ohio Edison. (Carrier Deposition Transcript p. 47, lines 1-20).

On June 14, 2004, Appellee Lisa Huff, a wife and mother of two minor children, Appellees, Samantha Huff (age 14) and Faith Huff (age 3) was taking a walk with a girlfriend along the public roadway, King Graves Road in Fowler Township, Trumbull County, Ohio.

Caught in what was classified as a moderate rain storm, Lisa proceeded along the road, past a tree on the property located at 6717 King Graves Road. Ohio Edison maintained a prescriptive easement where the tree stood, and the tree was located within the inspection zone/corridor for utility line vegetation management of the Appellants and was approximately 48 inches in diameter. As Lisa proceeded past the tree, part of the tree broke approximately 28 feet from the ground and struck her from behind on the road, resulting in grave and permanent injuries.

The subject tree was an open and obvious detectable hazard prior to the accident at issue. It included a series of defects which taken in totality created the hazardous classification. The total removal of branches on the north side of the tree created a tree top or crown of multiple tons in weight that was unbalanced to the south, toward the road. This removal of branches on the north side of the tree, to clear for the utility lines in that direction, resulted in the pronounced absence of a crown on the north side up to a height of 46 feet and the scars from these removals contributed to the tree's internal decay. Decay within the trunk created a substantial strength loss and risk of failure under commonly occurring wind conditions based on commonly employed arboricultural guidelines. The tree had several other, readily-visible signs of extensive decay. These signs in totality, together with the presence of a public road nearby, constituted a detectable hazard. (Report, Dr. Kim C. Steiner, June 27, 2007, pp. 7-8). It was also noted that due to the weakened condition of the tree, the size of the crown, and predominate wind angles the tree posed a simultaneous hazard to the utility lines on the north side of the tree as well (Deposition, Dr. Kim C. Steiner, February 22, 2008, pp. 214-215).

The total condition of the tree as being hazardous due to a history of line clearance practices was open and obvious in May of 2001, when Asplundh Tree Expert Company went to the property located at 6717 King Graves Road to perform the contracted services for Ohio

Edison. (See Deposition of Dr. Kim C. Steiner). Despite the presence of a priority or hazardous tree in the inspection zone/corridor caused by line clearance practices, neither Asplundh nor First Energy/Ohio Edison took any steps to remove the subject tree. Despite the fact that the tree was clearly located within the Appellants' inspection zone/corridor and easement, nothing was done to the tree to safeguard the public from its altered hazardous condition. That tree remained in that altered hazardous state from at least May, 2001 until Lisa Huff's incident of June 14, 2004 when a part of the tree collapsed at an angle north of parallel to the roadway in the direction of the power lines with large limbs extending across the roadway causing Lisa Huff severe, permanent injuries.

On June 5, 2008, Appellees Lisa Huff, her husband Reggie Huff, and their children, Samantha and Faith Huff, filed a Complaint in the Trumbull County Court of Common Pleas against Appellants First Energy Corporation, Ohio Edison, and Asplundh Tree Expert Company. Subsequent thereto, Ohio Edison, First Energy, and Asplundh Tree Expert Company filed Motions for Summary Judgment. On July 15, 2008, the trial court awarded Summary Judgment to First Energy, Ohio Edison, and Asplundh Tree Expert Company.

On August 12, 2009, Appellees filed an appeal in the Eleventh District Court of Appeals. In its Opinion of March 31, 2010, the Court of Appeals reversed the trial court's decision as it pertained to Appellants Ohio Edison and Asplundh. The matter was remanded to the Trumbull County Court of Common Pleas for further proceedings.

On May 13, 2010, Ohio Edison filed its Notice of Appeal and Memorandum of Jurisdiction to this Ohio Supreme Court; and on May 18, 2010, Asplundh did the same, both identifying this matter as a discretionary appeal and a case of public or great general interest. On May 27, 2010, the Eleventh District Court of Appeals denied Appellants' applications for

reconsideration of the March 31, 2010 Opinion. Subsequent thereto, the Eleventh District Court of Appeals denied Asplundh's request to certify this matter as a conflict of laws to this Supreme Court.

On August 25, 2010, this Court declined jurisdiction to hear the case. Appellant Ohio Edison filed a Motion for Reconsideration on September 3, 2010; and Appellant Asplundh filed its Motion for Reconsideration on September 7, 2010. However the Appellants' Motions for Reconsideration fail to raise any new arguments or facts and therefore should be denied.

I. Appellants' arguments have already been raised and considered by this Court prior to denying jurisdiction. Appellants' Motions for Reconsideration should be denied.

Appellant Asplundh's first argument in its motion for reconsideration states, "The appellate court decision interprets a **boilerplate "on the job" safety provision** commonly found in service and construction contracts throughout this state so as to impose obligations to **intended beneficiaries** for risks which bear no relation to the subject matter of the contract and which occur long after the contracted work is completed." (Emphasis added) In Appellant Asplundh's Memorandum In Support of Jurisdiction, the third proposition of law states, "A **generic on-the-job safety provision** in a contract cannot give rise to a party's status as an **intended beneficiary** with respect to an accident which occurs long after the work is completed." (Emphasis added)

A review of Appellant Asplundh's Motion for Reconsideration and its Memorandum in Support of Jurisdiction reveals that Appellant is merely repeating the same arguments it raised in its Memorandum in Support of Jurisdiction. Appellant Asplundh has not raised a new issue with its Motion for Reconsideration. This Court has reviewed the issue and declined to accept jurisdiction. Appellant Asplundh has had its opportunity to thoroughly brief this issue and set

forth its argument in the memorandum in support of jurisdiction. "A motion for reconsideration shall not constitute a reargument of the case..." *S.Ct.Prac.R. XI(2)(B).* Appellant Asplundh is attempting to reargue the case in violation of the Rules of Practice of the Supreme Court of Ohio. Accordingly Appellant's Motion for Reconsideration must be denied.

Appellant Asplundh's second argument in its motion for reconsideration states, "The appellate court decision **imposes a duty** on an electric utility and tree service provider **to protect the general public** from hazards **which pose no threat to utility equipment.**" (Emphasis added) In Appellant Asplundh's Memorandum In Support of Jurisdiction, the first proposition of law states, "A utility and/or its retained tree service contractor has **no duty to protect the general public** on public roadways from trees not located on utility property or within a utility easement **which do not pose a threat to utility equipment.**" (Emphasis added) This Court has reviewed the argument raised by Appellant Asplundh and has correctly declined to accept jurisdiction. "A motion for reconsideration shall not constitute a reargument of the case..." *S.Ct.Prac.R. XI(2)(B).* As is readily apparent, Appellant Asplundh is attempting to reargue and further delay this case. Therefore, Appellant's Motion for Reconsideration must be denied.

Appellant Asplundh's Motion for Reconsideration is nothing more than a condensed version of its Memorandum in Support of Jurisdiction. Appellant Asplundh's arguments concerning the Appellate Court's decision regarding the interpretation of the contract and intended beneficiaries and the Appellate Court's decision regarding the duty to protect the general public from hazards were both raised in the Memorandum In Support of Jurisdiction. Appellant Asplundh cannot reargue the issues again. See *State ex rel. Shemo v. Mayfield Hts.* (2002), 96 Ohio St.3d 379, 383, 775 N.E.2d 493, 498 citing S.Ct.Prac.R. XI(2)(A). Based on the foregoing, this Court should deny Appellant Asplundh's Motion for Reconsideration.

Appellant Ohio Edison's Motion for Reconsideration also merely repeats the same arguments it made in the Memorandum in Support of Jurisdiction. In its Motion for Reconsideration, Appellant Ohio Edison again takes issue with the Appellate Court's decision as it relates to the interpretation of the contract, the intent of the parties to the contract and third party beneficiaries. (See pages 2-5 of Appellant Oho Edison's Motion for Reconsideration) These issues were raised and briefed by Appellant Ohio Edison in its Memorandum in Support of Jurisdiction. (See pages 11-13 of Appellant Ohio Edison's Memorandum in Support of Jurisdiction)

In its Motion for Reconsideration, Appellant Ohio Edison has reiterated most, if not all of the arguments raised in its Memorandum in Support of Jurisdiction, yet it has failed to point out any obvious errors or raise issues which this Court failed to consider. Appellant Ohio Edison has offered nothing new in its Motion for Reconsideration. The issues raised in the Appellant's Motion for Reconsideration have been briefed and considered by this Court. This Court has already declined to accept jurisdiction. Appellant Ohio Edison's attempts to reargue these issues are not authorized by Rules of Practice of The Supreme Court of Ohio. *State ex rel. Shemo v. Mayfield Hts.* (2002), 96 Ohio St.3d 379, 381, 775 N.E.2d 493, 495 Therefore, Appellant's Motion for Reconsideration must be denied.

The issues presented to this Court are not matters of public or great general interest. Conversely public interest was protected through the remand of this matter to the trial court. This case involves application of well-settled law to case-specific facts. Appellees request that this Honorable Court deny Appellants' motions for reconsideration.

II. Appellants' attempts to reargue the private intent of the contracting parties is not supported by the facts.

Appellants' statement of limited intent of contractual liability is not supported by facts. Under Appellants self-serving definition of the "intent" of their contract, leaving the job site in a hazardous condition would be considered proper as long as it did not interfere with the utility lines. On two separate occasions, Appellant Asplundh inspected the area where the tree was located and left in an extremely hazardous condition caused by the vegetation management of Ohio Edison itself without taking any action to remove the artificially induced hazard. This conduct violates "accepted forestry practices" invoked within the contract where notification of the observed hazard would be required even if the hazard were naturally occurring. The record shows that Asplundh inspected the subject property for tree removal and did in fact remove two smaller trees.

The invocation of "accepted forestry practices" within the subject contract is a rather obvious product of intent to mitigate liabilities which may arise from failing to engage all "accepted forestry practices" as the trier of fact may find. Accepted forestry practices are not controlled by or based on a narrowly defined temporary job site safety concern as shown within Appellee's Original Complaint and its Attachments. Further, the Eleventh District Court of Appeals found that Ohio Edison's daily job site and work product inspection and oversight by full time professional foresters creates shared liability. There is nothing new about the principle of law that underpins this finding.

III. The Appellate Court correctly affirmed the Assignments of Error and overruled decision of the trial court. On remand to the trial court, the case is not limited to the narrow issue as Ohio Edison has asserted.

Within the motion for reconsideration, Appellant Ohio Edison erroneously concludes that the Appellate Court has reduced the entire case to one narrow contract issue. In fact the exact

opposite is true. Civ.R. 56(C) provides that a court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Flemming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377. The threshold for reversing the granting of summary judgment is met upon the finding of one issue of dispute at which point all remaining issues are moot as to any appeal. The Eleventh District Court of Appeals addressed the assignments of error together for convenience. However, the Appellate Court did find that there was a genuine issue of material fact and affirmed both of Appellees' assignments of error as they pertained to Appellants Ohio Edison and Asplundh. Those assignments of error leave no aspect of the trial court's rulings related to Ohio Edison and/or Asplundh intact.

In fact the author of that Opinion, Judge Cynthia Westcott Rice, identified an additional and separate basis for reversal within her dissent to the denial of reconsideration (See Eleventh District Appellate Court Judgment Entry May 27, 2010 Case 2009-T-0080). Concerning a breach of the "standard of care" Judge Rice found that a hazard to the lines triggers a duty to remove. Judge Rice stated:

> "In this case, I believe a duty to remove would be triggered *only* if the tree presented a hazard to the lines" (emphisis quoted).

In fact the record is clear that the subject tree did in fact present a hazard to the power lines as the term "hazard" is defined by "accepted forestry practices", arborists and tree experts. This fact is based on the sworn statements of Appellees' experts, Appellants own full time forester witness, the size and height of the crown and supporting evidence of predominate wind angles provided by NOAH, etc. all of which exists upon the trial court record and within the appellate briefs with significant detail provided within Appellees' Reply Brief. But for the

misdirection caused by the false claims of Appellant Asplundh within its various briefs that it is "undisputed" that the tree posed "no hazard to the power lines", Judge Rice would have been constricted to reversal on separate grounds based on her own conclusions of law. This error was not essential to the Appellate Court's Judgment of reversal and was therefore, harmless. Arguing an erroneous fact from a dissent opinion is nothing more than a thinly veiled attempt to cause unnecessary delay.

Further, it is essentially undisputed that the subject tree fell within a prescriptive easement owned by Ohio Edison. As such a duty attributable directly to the easement owner, arises to maintain the easement and keep it from becoming a nuisance as Appellee has argued and set forth in the lower court. Still further, a duty arises to notice an obvious hazard created and allowed to remain unabated by the Appellants regardless of the existence of a contract or an easement.

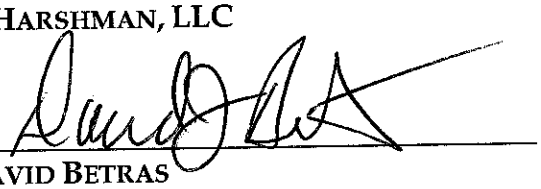
CONCLUSION

Appellants' motions for reconsideration are nothing more than a reargument of the case. Thus, Appellees' Memorandum Opposing Jurisdiction also could serve as a response to Appellants' motions for reconsideration. Appellants' motions for reconsideration are condensed versions of their memoranda in support of jurisdiction. As Appellees explained, in greater detail, in their Memorandum Opposing Jurisdiction, the issues presented to this Court are not matters of public or great general interest. Conversely public interest was protected through the remand of this matter to the trial court. This case involves application of well-settled law to case-specific facts.

Based on the jurisdictional memoranda filed in this case, this Court declined jurisdiction. It is well settled that the reconsideration procedure set forth in S. Ct. Prac. Rule XI is clearly

designed for those very limited instances where the court believes, in retrospect, that a mistake has been made. *Accord, State ex rel. Huebner v. W. Jefferson Village Counsel* (1995), 75 Ohio St.3d 381, 383. This is not one of those rare instances. The Motions for Reconsideration are the same arguments which Appellants raised in their jurisdictional memoranda. "A motion for reconsideration shall not constitute a reargument of the case..." *S.Ct.Prac.R. XI(2)(A).* Based on the foregoing, Appellants respectfully submit there is no basis for this Court to reconsider the decision to decline jurisdiction, and therefore urges the Court to deny Appellants' Motions for Reconsideration.

RESPECTFULLY SUBMITTED,
BETRAS, MARUCA, KOPP
& HARSHMAN, LLC



DAVID BETRAS
ATTORNEY FOR PLAINTIFF-APPELLEE
Ohio Supreme Court No. 0069160

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Motion for Reconsideration has been sent to Counsel for Defendants-Appellants, Attorney John T. Dellick, at 26 Market Street, Suite 1200, PO Box 6077, Youngstown, OH 44501-6077; Attorneys Clifford C. Masch and Brian D. Sullivan, at 1400 Midland Bldg., 101 Prospect Avenue West, Cleveland, OH 44115-1091, by regular US Mail, on this 16th day of September, 2010

DAVID BETRAS
ATTORNEY FOR PLAINTIFF-APPELLEE
Ohio Supreme Court No. 0069160